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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Docket No. 3:16-MD-2738-FLW-LHG

IN RE:

JOHNSON & JOHNSON TALCUM
POWDER PRODUCTS MARKETING,
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION

J&J's APPLICATION TO
STRIKE
CONFIDENTIALITY
DESIGNATIONS
VIA REMOTE ZOOM
VIDEOCONFERENCE

* * * *

FRIDAY, SEPTEMBER 22, 2023

* * * *

BEFORE: SPECIAL MASTER JOEL SCHNEIDER, USMJ, RETIRED
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9 above matter taken stenographically by
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12 State of New Jersey and the Commonwealth of
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1 SPECIAL MASTER SCHNEIDER: We're on the
2 record in the Talc MDL. I think we've been going by
3 docket 3:16-MD-2738.

4 We're here on J&J's application to
5 strike the confidentiality designations to certain
6 documents. I've read the papers, I think I
7 understand all the arguments. Why don't we start
8 with the entries of appearance and we'll get right
9 into it.

10 MR. LAPINSKI: Your Honor, good
11 afternoon. On behalf of the Plaintiff's Steering
12 Committee, Daniel Lapinski from the Motley Rice law
13 firm.

14 MS. O'DELL: Good afternoon, your
15 Honor. Leigh O'Dell from Beasley Allen on behalf of
16 the Plaintiff's Steering Committee.

17 MS. PARFITT: Good afternoon, your
18 Honor. Michelle Parfitt, Ashcraft & Gerel on behalf
19 of the Plaintiff Steering Committee.

20 MR. TISI: Chris Tisi from Levin,
21 Papantonio, Rafferty on behalf of the Plaintiff's
22 Steering Committee.

23 MS. SHARKO: Susan Sharko, Faegre
24 Drinker, Biddle & Reath for the Johnson & Johnson
25 defendants.

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1 MS. HAAS GEORGIEV: That leaves me, I'm
2 Christine Haas. I represent The Regents of the
3 University of California on behalf of its San
4 Francisco campus, UCSF.

5 SPECIAL MASTER SCHNEIDER: And you may
6 see Clarissa on the phone probably. She works with
7 me, so I asked her if she could sign in.

8 MR. FRIEDMAN: And Eric Friedman also
9 for the Johnson & Johnson defendants, Faegre, Drinker
10 Biddle & Reath.

11 SPECIAL MASTER SCHNEIDER: Oh, I'm
12 sorry, Eric. I didn't mean to cut you off.

13 I've read the papers, I think I
14 understand it. We've done this a couple of times and
15 I think you know how I like to do things.

16 I have a couple of questions I'd like
17 to get clarified and then I'll hear any argument, of
18 course, anybody wants to make.

19 Barring unforeseen circumstances, I
20 hope to rule today to be confirmed in an order, but
21 that remains to be seen.

22 Just in terms of questions, let's start
23 with basics. I know we're dealing with the documents
24 of Dr. Saed and Dr. Smith-Bindman. We went into
25 detail with Dr. Saed's documents, the ones that are

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1 issued, and I just want to make sure that I got it
2 right.

3 Dan, are the documents we're talking
4 about, one, the peer-review comments on the article
5 he submitted for publication, drafts of his
6 manuscript, and I saw some notations to perhaps some
7 data. Are those generally the documents we're
8 talking about?

9 MR. LAPINSKI: I think generally, yes,
10 your Honor. I don't recall the date of the email
11 that I had sent, but in the number of pages that have
12 been produced by Dr. Saed, our position is that
13 everything except for the documents that I
14 specifically identified should remain confidential.
15 And the documents identified that would not be
16 confidential would be things like his CV, invoices
17 that were generated, any manuscripts that have been
18 published, those actual published manuscripts would
19 not be confidential, but that any other materials
20 would be. Materials such as drafts of manuscripts,
21 underlying data related to the manuscripts, emails
22 between co-authors related to the manuscripts, edits
23 to the manuscripts, emails and exchanges with
24 journals in regard to draft manuscripts and
25 considerations for publication. It's our position

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1 that all of that information is all part of Dr.
2 Saed's product, the product that he makes, which is
3 published journals. That's what he does for a
4 living. He does research in order to create a
5 product and the product is his manuscript that gets
6 published.

7 The same holds true, from our position,
8 for all of Dr. Smith-Bindman's documents where
9 everything that underlies the work that she does in
10 order to publish her product would be considered
11 confidential information.

12 SPECIAL MASTER SCHNEIDER: You're a
13 little ahead of me, Dan. I just want to make sure we
14 identify the categories of the documents at issue.

15 So Susan, if we categorize them as
16 communications regarding his manuscript, peer-review
17 documents communications, and data that he developed,
18 is that a fair characterization, in your view, of
19 generally the categories of documents we're dealing
20 with with Dr. Saed?

21 MS. SHARKO: I think so. It's really
22 everything that they've produced and they should have
23 produced all of the documents related to the study,
24 from the lab notebooks and documents related to how
25 they did the study. He did the study all the way up

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1 through publication. And there will be more
2 documents produced by Dr. Saed and Dr. Smith-Bindman
3 in the future because we stopped, as you all know,
4 when the curtain went down and now the papers have
5 been published and the peer-review process continued
6 to go on, at least as to Dr. Smith-Bindman. So there
7 will be documents in the future, I expect they'll be
8 the same types of documents, and I expect everybody
9 will be bound by whatever your Honor rules today.

10 SPECIAL MASTER SCHNEIDER: Dan, we
11 didn't go into as much detail at the last or argument
12 with Dr. Smith-Bindman's documents, but does her
13 documents fit into the same general categories as Dr.
14 Saed?

15 MR. LAPINSKI: I believe they do and I
16 do see that counsel for the university is nodding in
17 agreement.

18 I think we're generally looking at the
19 same things. We're looking at communications amongst
20 and between co-authors. We're looking at
21 communications with peer-reviewers of prospective
22 journals that would publish it. We're looking at the
23 underlying data and research that was done by the
24 doctors in support of the work that they were doing.

25 The only other category that I would

1 add in there, your Honor, that I don't think you
2 brought up when you were putting categories out there
3 would be draft manuscripts. We think the drafts of
4 the manuscripts would be considered confidential as
5 would all of the materials that are related to the
6 research.

7 SPECIAL MASTER SCHNEIDER: Okay.

8 Now, with regard to Dr. Saed, my
9 understanding is that he submitted the manuscript to
10 a number of publications, maybe five sticks in my
11 head, and they were rejected. So is it a fair
12 assumption that the manuscript we're talking about
13 with regard to Dr. Saed is not going to be published?

14 MR. LAPINSKI: Dr. Saed's manuscript
15 was subsequently published, your Honor. I believe it
16 was published in November of 2021.

17 SPECIAL MASTER SCHNEIDER: Okay.

18 MS. SHARKO: And then it was published
19 again in April of this year.

20 SPECIAL MASTER SCHNEIDER: In different
21 journals?

22 MS. SHARKO: Yes, I believe so.

23 MR. FRIEDMAN: I think it was the same
24 journal, it was electronically published in November
25 of last year, finally got into print this year.

1 SPECIAL MASTER SCHNEIDER: Okay. So do
2 you happen to know the name of that journal that it
3 was published in?

4 MR. LAPINSKI: Your Honor, I don't have
5 that right in front of me, but I have a feeling that
6 Eric is going to be able to tell us.

7 MR. FRIEDMAN: It's Minerva Obstetrics
8 and Gynecology. The full cite is in our submission
9 of September 12th.

10 SPECIAL MASTER SCHNEIDER: Got it.
11 Is that the same manuscript that was
12 not accepted by the five other journals?

13 MR. LAPINSKI: What I will say, your
14 Honor, is that it's a manuscript that is based upon
15 the same underlying work that was done by Dr. Saed.
16 As Dr. Saed submitted it from one journal to another
17 journal, there may have been edits that were made to
18 his manuscript based upon comments and criticisms
19 that he may have received from one journal in
20 rejecting it. So I won't say that it's the same
21 exact manuscript, I'll say that it's all based upon
22 the same underlying data.

23 SPECIAL MASTER SCHNEIDER: And there is
24 no question that Dr. Smith-Bindman's manuscript,
25 article, what have you, was, in fact, published,

1 right?

2 MR. LAPINSKI: Correct, your Honor.

3 SPECIAL MASTER SCHNEIDER: Okay.

4 There was discussion, at least at the
5 last argument, about posters and abstracts of Dr.
6 Saed, and I think that was before his article was
7 published.

8 Is that at issue in this dispute?

9 MR. LAPINSKI: Well, your Honor, I
10 don't think the actual abstract that was published or
11 the published manuscript, I don't think that either
12 of those things are at issue here. From plaintiffs'
13 perspective, those things have been published and
14 we're not looking to keep that confidential. It's a
15 published manuscript. It was an abstract that was
16 displayed at a particular conference. We don't think
17 that that's confidential. What we do think is
18 confidential is all of the data underlying it, all of
19 the drafts related to the abstracts and manuscripts,
20 and all of the communications between the co-authors
21 and between journals that considered the manuscript
22 for peer-review. We think all of that should remain
23 confidential.

24 SPECIAL MASTER SCHNEIDER: Okay. Got
25 it.

1 I have a couple more questions.

2 I know Ms. Sharko's answer to this.

3 Let me ask plaintiffs.

4 Is there a dispute that other experts,
5 testimonial experts, are relying on the work product
6 of Dr. Saed and Dr. Smith-Bindman in their expert
7 reports and opinions?

8 MR. LAPINSKI: I think that there is
9 probably a dispute in the way that that's worded,
10 your Honor, for the following reason. Our experts
11 are relying upon Dr. Saed's published manuscript.
12 They're relying upon Dr. Smith-Bindman's published
13 manuscript. Our experts have not been given and are
14 not relying upon the draft manuscripts or the
15 laboratory notebooks or the underlying data that has
16 not been published as part of the manuscript. Our
17 other experts have not been given communications
18 between the co-authors related to draft manuscripts,
19 they're relying upon published information that's out
20 in the public domain.

21 SPECIAL MASTER SCHNEIDER: But at least
22 as to the final version, the final manuscript, the
23 published article, other experts besides Dr. Saed,
24 Dr. Smith-Bindman are relying on those final
25 articles, manuscripts, what have you, in support of

1 their opinions?

2 MR. LAPINSKI: Yeah, I believe on the
3 plaintiffs' side and on the defense side as well.
4 The defendants are probably relying upon it and the
5 defense experts are probably relying upon it in order
6 to try and undercut the plaintiffs' positions.

7 SPECIAL MASTER SCHNEIDER: All right.

8 Dan, you argued in your letter brief,
9 and correct me if I'm wrong, if I'm misstating your
10 argument. I don't want to put words in your mouth.

11 MR. LAPINSKI: Are you willing to tell
12 me whether you agree or disagree with my argument
13 before you ask me to clarify my position?

14 (Laughter.)

15 SPECIAL MASTER SCHNEIDER: Well, let me
16 say this: The court ruled on October 8th, 2021 that
17 the attorneys'-eyes-only designation was stricken,
18 but keep the confidentiality designations.

19 It's pretty clear in the transcript,
20 and I can cite the page and line numbers, if you
21 want, that I clearly indicated that I was basing the
22 decision on the record that existed at that time and
23 that if new facts or circumstances were presented, I
24 would listen to J&J's application.

25 If I read your argument correctly, Dan,

1 you were arguing that there are no new facts and
2 circumstances that justify revisiting the decision
3 from a couple of years ago.

4 Did I correctly state your position?

5 MR. LAPINSKI: I think that fairly
6 states it, your Honor, yes.

7 SPECIAL MASTER SCHNEIDER: All right.

8 Why do you take the position that there
9 hasn't been a change in circumstances?

10 MR. LAPINSKI: Well, the primary reason
11 for that position, your Honor, is that at the time of
12 our argument on October 8th of 2021, plaintiffs
13 argued not only that we had satisfied the Valsartan
14 standards, that we had satisfied the good faith
15 standards of Pansy, but that in addition to that, our
16 arguments were the same arguments regardless of
17 whether the manuscripts got published or did not get
18 published. And the only thing that occurred in the
19 two-year period of time that J&J was in bankruptcy
20 and this case was stayed was that the manuscripts
21 were published. And during our arguments on October
22 8th, we addressed that issue with your Honor that
23 regardless of whether the manuscripts were published
24 or not published, the facts would remain the same;
25 that this was confidential information, it was all

1 information that was part of the product that Dr.
2 Saed produces, part of the product that Dr.
3 Smith-Bindman produces as the work that they do. So
4 from our perspective, nothing has changed.

5 And Ms. Sharko's arguments in
6 revisiting this issue were that we didn't meet the
7 standards of Valsartan, yet you've already
8 established that we had, you've already ruled that we
9 had. And that, two, our sole argument the first time
10 was that it was only based upon the fact that they
11 were draft manuscripts and that everything would
12 change once they were published. And that was never
13 our position. And in my letter to your Honor, I
14 cited to the part of the transcript where I
15 specifically said that even after the manuscripts
16 were accepted for publication, it would still be our
17 position that the information is confidential.

18 SPECIAL MASTER SCHNEIDER: Bear with me
19 one second.

20 Susan, of course you're going to have
21 an opportunity to respond.

22 When we had the argument on October 8,
23 2021, I have the transcript here, Dr. Saed's article
24 had not been published, correct?

25 MR. LAPINSKI: Correct.

1 SPECIAL MASTER SCHNEIDER: Is the same
2 true for Dr. Smith-Bindman?

3 MR. LAPINSKI: At the time of argument
4 in October of 2021, yes, correct. Her manuscript had
5 not been published either.

6 SPECIAL MASTER SCHNEIDER: Dan, do you
7 have the transcript there from October, 2021?

8 MR. LAPINSKI: I do.

9 SPECIAL MASTER SCHNEIDER: All right.
10 So on pages 37 and 38, you were talking about Ms.
11 Sharko's argument and there was some discussion of
12 PLOS ONE.

13 And on page 38 line 12 you say:
14 "They don't want you publishing the peer-review
15 comments before it's accepted because there is a
16 recognition not only by PLOS ONE, but by everyone in
17 the industry, that this is a closed and confidential
18 process and the integrity of the process would be
19 undermined if these reviews are published at any time
20 prior to the manuscript being accepted."

21 So should I take that to mean that what
22 you said about Ms. Sharko's argument wasn't correct?

23 And we'll ask her, but are you certain
24 that J&J's argument was that it doesn't make a
25 difference if it was before or after publication?

1 MR. LAPINSKI: Well, I'll let Ms.
2 Sharko speak for herself, but I know her argument was
3 it didn't make any difference whether it was before
4 or after publication, that everything should be free
5 and open to the public and not have any type of
6 confidentiality designation.

7 SPECIAL MASTER SCHNEIDER: Right.

8 MR. LAPINSKI: At pages 37 and 38, that
9 argument as it relates to PLOS ONE, first of all, was
10 dealing with the attorneys'-eyes-only designation and
11 not a confidential designation. That was dealing
12 with an argument related to attorneys' eyes only.

13 Second, and within the context of the
14 information coming out at all before the manuscript
15 is published would have a negative impact on the
16 ability of an expert to be able to get it published
17 at all. And that's why we wanted to have the
18 attorneys'-eyes-only designation.

19 Specific to PLOS ONE, at the time, Ms.
20 Sharko's argument was that PLOS ONE encourages the
21 editor to come forward and say I will publish my
22 comments along with the published manuscript. It
23 doesn't say that what PLOS ONE says is, if we're
24 going to publish the manuscript, we'll go back and
25 we'll try and find criticisms from JAMA or criticisms

1 from another journal and make sure that we publish
2 all of those negative criticisms as well. It just
3 said, we'll leave it to the editor at the time that
4 we have accepted and are going to publish this
5 manuscript, we'll leave it to the editor as to
6 whether or not they want to provide their comments.

7 But again, our argument there was
8 within the context of attorneys' eyes only and
9 impacting the integrity of the review process before
10 a manuscript is published.

11 SPECIAL MASTER SCHNEIDER: And so to be
12 clear, I just want to be clear because I'm not clear,
13 is it your position that before publication, the
14 materials should be designated attorneys' eyes only,
15 but after publication, it's sufficient just having a
16 confidentiality designation?

17 MR. LAPINSKI: Yes. And you ruled on
18 October 8th that --

19 SPECIAL MASTER SCHNEIDER: Right.

20 MR. LAPINSKI: -- it should not have an
21 attorneys'-eyes-only designation and that's a ruling
22 that we accepted, your Honor. But we accept that
23 ruling in the same way that we accepted your ruling
24 that the documents would remain confidential. And we
25 think the documents should be confidential because

1 all of the information that we're talking about is
2 all of the information that goes into the making of
3 the product.

4 If we were going to look at the secret
5 sauce that Burger King makes, there might be
6 publications about what people think of the secret
7 sauce. And if Burger King is involved in a
8 litigation, they may have to produce documents to the
9 opposing party as to what makes up their secret
10 sauce, but that's going to be produced in confidence
11 and it's going to be confidential. And that's the
12 same way that this work should be looked at.

13 For a living, Dr. Saed and Dr.
14 Smith-Bindman conduct research on behalf of their
15 universities in an effort to get that research
16 published. The publication is their product. That's
17 what they make for a living. And what goes in to
18 that final product being put out on to the market,
19 all of that should be confidential. Just as J&J
20 would not want us publishing all of the ingredients
21 and how they make up the fragrance of their talcum
22 powder, they wouldn't want us to publish that in the
23 Wall Street Journal and say, hey, this isn't
24 confidential because talc is subject to litigation.
25 That's confidential information because that is how

1 they make their end product.

2 So we can look at it as opposition in
3 this litigation, but we have to look at it under the
4 guise of a protective order. And the same should
5 hold true for Dr. Saed's product and Dr.
6 Smith-Bindman's product.

7 SPECIAL MASTER SCHNEIDER: We're not
8 going to revisit the issue of whether the documents
9 are confidential because I already ruled that they
10 are, but that's not the answer to the issue that we
11 have to deal with, whether that designation should be
12 stricken. The issue is, if you balance the interests
13 of the parties, whose interests come out on top?

14 At the time, in October 2021, I ruled
15 that the doctors' interests came out on top because
16 of the circumstances that then existed. But let's
17 hear from Susan about whether there was a change of
18 circumstances that validates changing the balancing
19 process.

20 But I'm going to ask your indulgence
21 for one second because if I don't plug my iPad into
22 the electricity, my battery is going to run out and
23 I'm going to disappear. So just give me three
24 seconds.

25 Susan, I'm going to take a wild guess

1 that you don't agree with Mr. Lapinski when he says
2 that there has been no material change in
3 circumstances that would justify a different result
4 when we balance the interests. But if I'm wrong, let
5 me know.

6 MS. SHARKO: No, you're absolutely
7 right. And I'd like to address that and the other
8 portion of Mr. Lapinski's argument.

9 So as to the change in circumstances,
10 there absolutely has been a change in circumstances.

11 Back in October, the plaintiffs were
12 arguing that they were afraid that there would be
13 some interference or potential interference in the
14 ability of these people, experts for hire, to get
15 their papers published. And they argued that that
16 was the harm, the alleged harm, that met the very
17 high standards in Valsartan and Pansy.

18 I disagreed with that at the time, I
19 still disagree with the fact or the conclusion that
20 they met the standards then, but that was then and
21 this is now and the circumstances are very different.

22 The papers have been published and
23 they're now out there in the scientific literature in
24 the public arena for the public to look at, for
25 scientists to look at, for people to kick the tires

1 and indeed try and replicate what they did. And
2 that's an inherent part of the scientific method,
3 that research can be studied and replicated. And you
4 see, not infrequently now, journals retracting papers
5 where scientists try to replicate studies that were
6 published and they couldn't do it.

7 And so the argument that this research
8 is a, quote/unquote, product and some type of,
9 quote/unquote, secret sauce that needs to be
10 protected, flies in the face of how science works,
11 how experiments are done, what other scientists think
12 of them, drafts, all that is and should be in the
13 public domain just as a matter of general public
14 policy for the advancement of science. And even more
15 so here, where these experts voluntarily engaged in
16 litigation.

17 This is not a situation where there was
18 a scientist who was publishing a paper who is not
19 involved in litigation. These are two individuals
20 who absolutely were involved in litigation. In Dr.
21 Saed's case, at least as to the first round of
22 research that he did, the plaintiffs paid for him to
23 do that. The plaintiffs even paid him by the hour to
24 write his publication.

25 Now, I don't know if circumstances

1 changed with regard to the second paper, we'll find
2 that out if and when he is deposed. And we'll learn
3 more about Dr. Smith-Bindman's paper if and when she
4 is deposed on the paper and the new information.

5 But these individuals voluntarily got
6 involved in the litigation knowing, and they had to
7 know, and certainly they knew after the first Rule
8 702 hearing before Chief Judge Wolfson, that their
9 work would be scrutinized from stem to stern.

10 And so yes, circumstances have changed
11 and the idea that this research is a, quote/unquote,
12 product, I submit is not a valid or legitimate
13 argument and it certainly can't be used to try and
14 establish the clear harm that you have to show, clear
15 potential harm that you have to show to get past the
16 bar in Pansy and Valsartan.

17 SPECIAL MASTER SCHNEIDER: This is what
18 plaintiffs argue in their September 20th letter, page
19 4. And I'll just paraphrase.

20 The research and manuscripts are highly
21 sensitive business information and represent a
22 written form of the researchers' ongoing intellect
23 and scientific endeavors. It's business information
24 that belongs to the researchers and the universities.
25 If confidentiality is not maintained, the experts

1 will suffer harm and be placed at a competitive
2 disadvantage. Public access will enable other
3 researchers and institutions to replicate practices
4 and processes that these experts have developed over
5 decades of practice.

6 Do you agree with that?

7 MS. SHARKO: I don't agree with that
8 for the reasons that I just said. And I note that
9 there is nothing in support of that argument. Those
10 are lawyers words. There is nothing from Dr. Saed,
11 there is nothing from Dr. Smith-Bindman, and I
12 wouldn't expect there to be anything from them
13 because I don't think that they could credibly take
14 that position as scientists. That's not how science
15 works.

16 So I strongly disagree with that.

17 SPECIAL MASTER SCHNEIDER: Dan, do you
18 want to respond?

19 And then I have another question.

20 MR. LAPINSKI: Sure.

21 I'll respond in a couple different
22 points I'll bring up.

23 First, in the October 8th, 2021
24 decision that you entered on the record on page 72,
25 lines 9 through 15, you said: The Special Master's

1 ruling, in its belief, will result in no material
2 prejudice to defendants. The defendant, and we're
3 talking about a ruling of confidentiality, the
4 defendant can still use the documents to adequately
5 protect its interests and to the Special Master's
6 understanding, those individuals who are on a
7 need-to-know basis will be able to see the documents.

8 So your Honor has already recognized
9 that when it's a balancing of harms, the
10 confidentiality designation results in no harm to the
11 defendants and no material prejudice to the
12 defendants.

13 Now, when we look at the harm on the
14 side of the experts and the disclosure of this
15 information, Ms. Sharko brought up the fact that
16 general public policy would encourage that all of
17 this information be released. But general public
18 policy, in the way that things are currently done in
19 the medical and scientific community, is not for this
20 information to be published and released at the time
21 that a manuscript is published. And it's not our
22 position to change what the medical and scientific
23 community does because Susan Sharko decides that she
24 wants to put something out in the public domain.
25 That's just not how it works.

1 In regard to the need for it to be out
2 there because they're experts and their work needs to
3 be scrutinized, that's what the defendants will be
4 able to do and that's what your Honor recognized in
5 his order when you said there will be no material
6 prejudice, that the individuals who are on a
7 need-to-know basis will see the information that they
8 need to see so that they can scrutinize and they can
9 attack the work that was done by Dr. Smith-Bindman
10 and Dr. Saed.

11 When it comes to someone publishing a
12 manuscript, and as Ms. Sharko said, in the scientific
13 community people will try and replicate it, the
14 published work, in order to be able to build upon it
15 or undercut it, well, that would be gone if someone
16 just handed them the entire playbook and said this is
17 how I do it. This is what I said to my co-author,
18 this is what I said to my co-researcher, this is how
19 we did things, then no doctor would serve any
20 long-term benefit to a university. Because once a
21 university and a physician published something, the
22 next university could just take that entire process,
23 those processes, those interactions and they could
24 use it and equally apply it inside their labs and do
25 it that way and it puts Dr. Saed and Dr.

1 Smith-Bindman and their universities at a competitive
2 disadvantage.

3 If doctors and researchers want to try
4 and replicate the work that has been done, they can
5 try and replicate the work that has been done by Dr.
6 Saed and Dr. Smith-Bindman in the same way that they
7 would try and replicate the work that was done by any
8 other researcher who had their research published in
9 a manuscript. And that's not by getting internal
10 emails, by getting draft manuscripts, by getting lab
11 notes, by getting data, that's not how it works.

12 As far as the idea of interference with
13 publication being the only harm, that was not the
14 only harm that was discussed during October 8th.
15 October 8th 2021, we talked about the harm associated
16 with interference with a publication for purposes of
17 attorneys'-eyes-only designation. But we also talked
18 during oral argument and prior to your ruling about
19 issues of the underlying data and information and
20 correspondence being confidential because of the harm
21 that would be suffered.

22 If Dr. Smith-Bindman and Dr. Saed
23 published their playbook on how they do their
24 research and what goes into conducting their
25 research, what's to stop anybody from doing it?

1 What's to stop anybody from making the same products
2 that they make, from doing the same work that they
3 do, from beating them in the next novel area that
4 they want to publish on, from beating them to the
5 punch there, because they know how Dr. Smith-Bindman
6 and Dr. Saed do things? That's the actual harm
7 that's there. It's real and it's tangible.

8 SPECIAL MASTER SCHNEIDER: Let me drill
9 down on that on a couple of points, Dan.

10 It's correct that in October '21 when I
11 balanced the interests of J&J against the plaintiffs,
12 I came out on the side of plaintiffs keeping the
13 designation. But it's true at that time that these
14 articles had not been published yet, correct?

15 MR. LAPINSKI: Correct.

16 SPECIAL MASTER SCHNEIDER: All right.

17 And the other thing that I'll just ask
18 you, and I would appreciate your answer on this so we
19 can go into it further is, when I have to balance the
20 interests as to whether confidentiality should be
21 kept or not kept, do you disagree that the public
22 interest in this information is a relevant factor
23 that should be evaluated?

24 MR. LAPINSKI: I think the public
25 interest lies in the publication of the manuscript

1 and the ability to see the manuscript just like any
2 other manuscript that is at issue in this litigation,
3 whether it's the O'Brien study, whether it's the Saed
4 study, whether it's the Smith-Bindman study, doesn't
5 matter what study it is, it's in the public interest
6 to be able to see those published studies and be able
7 to comparatively look at those published studies.

8 Defendants will have the opportunity to
9 be able to show to the public what their experts
10 believe of Dr. Smith-Bindman's study, what their
11 experts believe of Dr. Saed's study. They will have
12 their experts be able to look at the underlying data
13 and provide the necessary testimony and the necessary
14 information for the public to be able to analyze
15 this.

16 I go back to my earlier point. From a
17 public policy and a need to know, it would be in the
18 best interests of the public for the public to know
19 exactly how talcum powder and the fragrance within
20 talcum powder was manufactured and what the amounts
21 of each ingredient were inside of that. But in the
22 interests of confidentiality and because that's a
23 product that's produced by J&J, that's withheld from
24 the public. To the extent that it becomes an issue
25 at trial and it's discussed at trial, that will come

1 out and the public will be aware of it. But just the
2 general need for the public to know, no, beyond the
3 published manuscript, they don't have a right or a
4 need to know what's going on underneath and what the
5 underlying processes are. I don't think that there
6 is a public interest that goes beyond the protective
7 order in that regard.

8 SPECIAL MASTER SCHNEIDER: The harm to
9 the doctors that you've talked about, Dan, I
10 summarized and I took it from page 4 of your
11 September 20th letter.

12 MR. LAPINSKI: Yes.

13 SPECIAL MASTER SCHNEIDER: The middle
14 two paragraphs, highly sensitive information, they
15 can replicate the practices, et cetera. Where is the
16 evidentiary proof and evidence to support those
17 contentions?

18 MR. LAPINSKI: Where is the evidentiary
19 proof that it's highly sensitive information?

20 SPECIAL MASTER SCHNEIDER: Yes.

21 MR. LAPINSKI: Because it's information
22 that's in, as Ms. Sharko had said earlier, general
23 public policy. The general public policy is that
24 this type of information is not information that is
25 readily shared, its business information.

1 Dr. Saed can do studies and take
2 studies down a long path and ultimately decide that
3 that research was a dead end, but then three or four
4 years later may discover something else that would
5 reopen the opportunity of that research. And so any
6 communications that are related to the underlying
7 research that's done, that's proprietary information,
8 that's information that he's doing as part of his
9 business. And from an evidentiary perspective, the
10 fact that it's not released in other situations and
11 that it's always maintained and not part of
12 publications, if it were the general practice that
13 all of this information was supposed to be shared,
14 then when a manuscript was published, there would be
15 thousands of pages attached to the manuscript that
16 would be all of the back and forth between the
17 co-authors, that would be all of the underlying data,
18 all of the underlying lab notes. That's just not how
19 it's done. And the reason that its not done is
20 because this is a highly competitive environment.
21 There are doctors who are competing against each
22 other in research to be able to publish. There are
23 universities that are relying upon those doctors and
24 the research that's done by those doctors in order to
25 increase the prestige of those universities. So

1 that's what I put forward as evidence.

2 SPECIAL MASTER SCHNEIDER: Dan, you may
3 or may not be true, I'm not going to weigh in on that
4 as to articles that are published generally for
5 academic purposes. I'm not saying this isn't an
6 academic purpose, but we're in the litigation context
7 here now. Can you make the same representation that
8 in the litigation context that it's always always the
9 case that peer-reviewed documents aren't
10 discoverable?

11 MR. LAPINSKI: Well --

12 SPECIAL MASTER SCHNEIDER: Or even
13 confidential?

14 MR. LAPINSKI: I think what you need to
15 separate there, your Honor, is that in the litigation
16 context, Dr. Saed and Dr. Smith-Bindman submitted
17 expert reports that provided their opinions on the
18 research that they were doing. And those expert
19 reports are fully available and can be scrutinized
20 and the public can have access to them. Their
21 publications and Dr. Saed publishing in Minerva in
22 his first publication that he had and Dr.
23 Smith-Bindman's publications, that's not part of
24 litigation, that's part of what they do for a living.
25 That's part of what they're paid to do by the

1 universities, is to conduct research and publish
2 manuscripts.

3 So I think there is a difference
4 between the two. The publications and their
5 manuscripts are part of what they do as a living.
6 Their expert reports they submitted and the testimony
7 that they provide in the litigation is something
8 that's wholly separate and apart from their
9 publications. And that's why --

10 SPECIAL MASTER SCHNEIDER: So let me
11 address a situation.

12 On August 30th, the plaintiffs wrote to
13 Judge Shipp and cited, in support of this Daubert
14 dispute that the parties are having, Dr.
15 Smith-Bindman's article, correct?

16 MR. LAPINSKI: I think it responds to
17 Ms. Sharko's letter to the court about all of this
18 new science that has been published in favor of the
19 defendants' position. In response we wrote and said
20 science is changing, there is new science that's out
21 there. This O'Brien study is out there. There is a
22 study that's out there by Saed, there is a study
23 that's out there by Smith-Bindman.

24 SPECIAL MASTER SCHNEIDER: I know Dr.
25 Smith-Bindman's article was cited to Judge Shipp.

1 Was Dr. Saed's article also cited in support?

2 MS. O'DELL: It was not.

3 MR. LAPINSKI: I don't believe --

4 MS. O'DELL: It was not.

5 SPECIAL MASTER SCHNEIDER: It was just
6 Dr. Smith-Bindman. Okay.

7 So now the public has access to this
8 document and the public's reading that the
9 plaintiffs' attorneys believe that Dr.
10 Smith-Bindman's article supports their conclusions
11 and opinions.

12 Hypothetical question, Dan. Purely
13 hypothetical. Suppose there is peer-review comments
14 in Dr. Smith-Bindman's confidential files similar to
15 those that have been cited that I read about that
16 were in Dr. Saed's file substantially criticizing the
17 work product. Would it not be prejudicial to J&J if
18 they couldn't get word out to the public that these
19 articles that were cited to Judge Shipp in support of
20 plaintiffs' opinions may not be as accurate or
21 truthful as the plaintiffs say it to be?

22 And doesn't that weigh into the
23 balancing of interests here? Does the public have a
24 right to see that information, what those
25 peer-reviewers say? I don't know exactly what they

1 say, Dan, they could be this is the greatest article
2 in the world and that would be great. I don't know.
3 I don't know if they're good or bad. But if this
4 article is presented to the court and is presented to
5 the public to support the plaintiffs' position,
6 shouldn't the public have the right to see all
7 information that's relevant to the veracity and
8 credibility and believability of that study?

9 MR. LAPINSKI: I don't think that's
10 correct. And the reason that's not correct, the
11 simple reason is that when defendants cite to an
12 article, and let's use the O'Brien article as an
13 example, when the defendants cite to the O'Brien
14 article, the public has the ability to be able to go
15 and search for and pull up the O'Brien article and
16 read the O'Brien article and make a determination as
17 to their position on the O'Brien article.

18 When plaintiffs cite to the
19 Smith-Bindman article that's been published, the
20 public has the ability to be able to go and pull up
21 the Smith-Bindman manuscript and look at the
22 Smith-Bindman manuscript and form their opinion as to
23 what they think of the Smith-Bindman manuscript.
24 What the public does not have the ability to do is to
25 pull up all of the comments that may be underlying

1 the O'Brien manuscript, if any.

2 SPECIAL MASTER SCHNEIDER: Why not?

3 MR. LAPINSKI: Well, because the
4 O'Brien manuscript is a manuscript that was published
5 in the same way that the Smith-Bindman manuscript was
6 published, but the difference is that Dr.
7 Smith-Bindman has also agreed to testify as an expert
8 in this case. So people interested in O'Brien can't
9 get emails back and forth between O'Brien and the
10 co-authors about what they're doing, they can't get
11 critiques from manuscripts, they can't get underlying
12 lab notebooks or data, they can't get that
13 information. Nor should they be able to get that
14 information as it relates to Dr. Smith-Bindman's
15 article.

16 Now, down the road, because defendants
17 will have this information in confidence, the
18 defendants will be able to say we think Dr. Saed's
19 opinions are hogwash, we think Dr. Saed is a paid
20 shill for the plaintiffs, and we don't think that
21 there is any credence or credibility to what Dr. Saed
22 says. And the defendants will be able to have their
23 experts testify as to why. But just generally making
24 it open and available to the public because someone
25 has decided that they want to be able to testify as

1 an expert in litigation, that's not appropriate.
2 That goes back to something that we talked about in
3 October of 2021 and the Hobson's choice that would be
4 created for not only plaintiffs' experts, but for
5 plaintiffs' counsel:

6 Plaintiffs' experts would be in a
7 position where they would have to say, do I want to
8 testify as an expert or do I want to do research. I
9 can't do both because if I do research and I testify
10 as a plaintiffs' expert, then my career as a
11 researcher is going to be put in jeopardy because I
12 have to share all of my information with everybody
13 and it can be replicated, it can be picked apart,
14 anything can happen. I don't want to have to undergo
15 that. You want to test the experts on their
16 published manuscripts, the public has the right to be
17 able to do that, just as the public has the right to
18 be able to say, J&J, we don't think your talcum
19 powder and fragrances are up to snuff. But they
20 don't get to look at what all of the ingredients are
21 in making that determination.

22 SPECIAL MASTER SCHNEIDER:
23 Hypothetically, again, I just want to emphasize this
24 is hypothetical, if there is something, and I don't
25 know if there is something, in Dr. Smith-Bindman's

1 confidential documents that are detrimental to her
2 credibility, bias, whatever, is not J&J prejudiced
3 because plaintiffs have held this article out to
4 Judge Shipp and the public as credible, but J&J can't
5 publicly rebut that at the present time with harmful
6 information that may exist?

7 MR. LAPINSKI: Well, your Honor, I
8 guess we'd have to define what harmful information is
9 because ultimately, the manuscript was published. So
10 ultimately, there was a reputable medical journal
11 that looked at the information that was contained in
12 the manuscript, looked at the work that was done and
13 felt that the work was credible and that the work
14 should be published. So I think --

15 SPECIAL MASTER SCHNEIDER: Well, look
16 at Dr. Saed, some of the comments that I read. This
17 is what I read in the briefs.

18 MR. LAPINSKI: Sure.

19 SPECIAL MASTER SCHNEIDER: Some of the
20 comments are pretty harsh. Okay? Pretty harsh. But
21 the article was published in the journal.

22 Do you think it's prejudicial to J&J
23 that if Dr. Saed's article is held out to the public
24 as some ground-breaking proof that J&J can't publicly
25 reveal what supposedly competent peer-reviewers said

1 about that article?

2 MR. LAPINSKI: Well, first of all, your
3 Honor, we don't know who the peer-reviewers are so we
4 don't know the competency of the peer-reviewers, we
5 don't know the motivations of the peer-reviewers. We
6 don't know the purpose behind the peer-reviewers'
7 comments.

8 There are some peer-reviewers' comments
9 that were minimal in nature and were just comments
10 about formatting or something. There were other
11 comments from peer-reviewers that were written like a
12 Daubert motion. And you have to question that type
13 of peer-review.

14 But ultimately, they're the opinions of
15 one, two, three, four people. And the opinions of
16 those four people shouldn't be used as a way to try
17 and skewer Dr. Saed and/or Dr. Smith-Bindman. And
18 for J&J to say that it's beyond them to do something
19 like that, I would just point to the ongoing
20 litigation against Dr. Moline right now. Dr. Moline
21 is an expert who testified at various trials and J&J
22 is now taking the position where they're going to sue
23 Dr. Moline for fraud and for statements that Dr.
24 Moline made. And that's what happens when the
25 information goes from being confidential and gets

1 moved out into the public domain. J&J then takes it
2 and doesn't use it just to say, hey, public look at
3 this, they use it in order to try and discourage
4 plaintiffs' experts from doing the work and doing the
5 research that they do.

6 SPECIAL MASTER SCHNEIDER: Last
7 question, then we'll turn it over to Susan.

8 Do you then believe that the public has
9 no right to see what these peer-reviewers said, good
10 or bad, good or bad, it doesn't matter, about these
11 published articles that are held out by one party or
12 the other as definitive and authoritative?

13 MR. LAPINSKI: Okay. So I don't think
14 that the public has a right to be able to see that.

15 Again, it's the opinions and criticisms
16 of one particular peer-reviewer. If we go back to
17 the October 2021 arguments when Ms. Sharko pointed
18 out and you brought up earlier today, your Honor, the
19 policy of PLOS ONE to leave it to the peer-reviewers
20 as to whether or not they wanted their comments
21 published along with the manuscript when the
22 manuscript was published. What you're doing is
23 you're taking information that was provided by a
24 peer-reviewer as criticism to someone's manuscript.
25 We don't know that the peer-reviewer wants that

1 information shared. We don't know that the
2 peer-reviewer isn't being hypercritical for purposes
3 of maintaining a higher standard. We don't know what
4 the motivation of the peer-reviewer was. But using
5 PLOS ONE as an example, we know that at minimum it
6 should be the option of the peer-reviewer as to
7 whether or not they want their comments shared. We
8 also know that again, we don't know what the
9 underlying bases or motivations are for the
10 peer-reviewer to make those comments.

11 So for those comments to be put out in
12 relation to a published manuscript just because the
13 author of that manuscript has chosen to testify as a
14 plaintiffs' expert, it actually creates more harm
15 than good because then those experts who have stepped
16 up and said yes, in addition to publishing
17 manuscripts, I will also testify as an expert, all of
18 the bad can come out about their work whereas none of
19 the potential bad underlying any other work comes
20 out. And it creates an improper and unbalanced
21 playing field.

22 SPECIAL MASTER SCHNEIDER: Susan, let
23 me turn the floor over to you.

24 We spent a lot of time with plaintiffs
25 about why their interests would be prejudiced if the

1 designations are stricken. If you believe the
2 contrary is true, that either they won't be harmed or
3 that your client or the public will be prejudiced or
4 harmed, let's hear it.

5 MS. SHARKO: Sure.

6 So the law is absolutely clear that the
7 plaintiffs have the burden of showing a,
8 quote/unquote, clearly defined and serious injury to
9 the party seeking confidentiality. And I'm reading
10 from the Pansy case at page 786. The defendant here
11 has no burden of proof at all. And the plaintiffs
12 have, in fact, adduced no evidence, no admissible
13 evidence, of a clearly defined or serious injury to
14 Dr. Saed or Dr. Smith-Bindman.

15 SPECIAL MASTER SCHNEIDER: Is that the
16 standard to justify a confidentiality designation in
17 the first instance?

18 MS. SHARKO: Yes.

19 SPECIAL MASTER SCHNEIDER: Okay. So
20 we're over that hump, Susan. We're over that hump.
21 I already held on October 8th, 2021 that they met the
22 Pansy standard. We're not going to reargue that
23 issue.

24 The issue now is balancing the
25 interests of the doctors and the interests of the

1 public and the parties, on whose side does the
2 balance now fall? Because in October 2021 when the
3 articles weren't published yet, when the articles
4 weren't out in the public, when one of articles
5 wasn't cited to Judge Shipp in support of the
6 plaintiffs' position, that didn't exist. Now they
7 exist. So why should the balance now fall in your
8 favor rather than the same as it did two years ago in
9 plaintiffs' favor?

10 MS. SHARKO: Because we're starting
11 over now. The harm that was alleged two years ago
12 was that the papers hadn't been published and, gee
13 whiz, if this stuff got out, maybe no journal would
14 publish them. And now they've been published. And
15 the new argument is that somehow the livelihood of
16 these experts will be impacted if the curtain is
17 lifted so the public can see exactly how they've done
18 this work. And I submit that there is no evidence of
19 that that's been put forward here. And, in fact, if
20 the expert were on the stand and had to respond to
21 these questions, they wouldn't take that position.
22 Because they have to say and I think they have said
23 that they did their studies by the book, that they
24 followed standard scientific methodology that anybody
25 would do. I don't think that either of these experts

1 will say that their methodology was unique or special
2 or should be kept secret. If they did, they would be
3 even more vulnerable to a 702 challenge. There is no
4 evidence that their livelihood would be affected,
5 there is no evidence to support the idea that there
6 is a Hobson's choice here now that the papers have
7 been published.

8 And essentially what the plaintiffs are
9 arguing is that the public is too dumb to understand
10 the underlying documents. And it's important to
11 recognize that the plaintiffs' bar has been very,
12 very vocal. It's in advertising, it's in the press,
13 it's everywhere that this product allegedly causes
14 ovarian cancer and they have scientific proof of
15 that. And I think the public is entitled to see the
16 underside of this alleged scientific proof. And if
17 the public doesn't see that, they're mislead in whole
18 or in part and my client is prejudiced.

19 This is totally different from should
20 the formula for talcum powder be released. First of
21 all, the ingredients were on the bottle back two
22 years ago when the product was available in the US.
23 But a formula for the making of a very unique and
24 special, indeed iconic, product is totally different
25 from how an alleged scientist performed an experiment

1 and what other people thought of it. It's night and
2 day.

3 So I submit that the designations
4 should be stricken, these documents should not be
5 protected, but they should be available in the normal
6 course of things.

7 SPECIAL MASTER SCHNEIDER: I only have
8 one more question and then I'll hear anything else
9 you want to add.

10 Do we have a dispute anymore about the
11 attorneys'-eyes-only designation and is really the
12 only issue whether the confidentiality designation
13 should remain? Because I thought I held in
14 October 2021 that the attorneys'-eyes-only
15 designation as to Dr. Saed's documents was stricken
16 and I thought that was going to be equally applicable
17 to Dr. Smith-Bindman's documents, but I just want to
18 make sure that there is no dispute about that.

19 MR. LAPINSKI: Your Honor, the only
20 point that I would bring up is that the Plaintiffs'
21 Steering Committee and plaintiffs' counsel is not
22 taking a position on attorneys' eyes only, whether
23 it's related to Dr. Saed or Dr. Smith-Bindman.
24 However, at the October 2021 argument and hearing,
25 counsel for the university wasn't present because it

1 was a hearing that was related specifically to Dr.
2 Saed and then Dr. Smith-Bindman was brought up at the
3 end. And it was for that reason that you maintained
4 the attorneys'-eyes-only designation on Dr.
5 Smith-Bindman's documents because you wanted the
6 university to have the opportunity to be heard on the
7 issues. So I would just point that out and counsel
8 for the university is here today.

9 SPECIAL MASTER SCHNEIDER: Okay. Well,
10 that's a good segue to the university.

11 Christine, is there anything that you
12 want to add? I received your letter, email, brief,
13 what have you.

14 Any argument you may have?

15 MS. HAAS GEORGIEV: Just a few, if you
16 don't mind, I'd like to raise a few points.

17 I don't really know what to say about
18 your last question because my understanding is that
19 her documents were attorneys' eyes only, so that's
20 what I assumed they are.

21 Again, I want to remind everyone that
22 the university's position in October 2021 was that
23 this was an inadvertent, unauthorized disclosure of
24 documents that could be detrimental to other UCSF
25 doctors and other interagency personnel.

1 I'd like you to know that any
2 third-party request for UC documents are subject to
3 the Public Records Act. It doesn't matter if it's in
4 the context of a formal request under the act. An
5 email, typically we get most of our requests via
6 email or in civil litigation, if it's a UC document,
7 we're entitled to our exemptions.

8 It's the university's position --

9 SPECIAL MASTER SCHNEIDER: Can I have a
10 time out? Can I have a time out there?

11 What's the support for that, Counsel?
12 Can you give me a case or a citation that says that?
13 Because I can give you -- I'm going to give you a
14 citation and a case or two that says exactly the
15 opposite.

16 Do you have anything that supports what
17 you just said?

18 MS. HAAS GEORGIEV: That any third
19 party request is subject to the --

20 SPECIAL MASTER SCHNEIDER: No, that the
21 Public Records Act trumps civil litigation.

22 MS. HAAS GEORGIEV: It's not that it
23 trumps civil litigation, it's that we still are
24 allowed to maintain our exemptions. We don't waive
25 our exemptions --

1 SPECIAL MASTER SCHNEIDER: What is the
2 support for that? Because I'm telling you, I'm going
3 to give you a citation in the statute and case law
4 that says exactly the opposite.

5 What are you relying on?

6 MS. HAAS GEORGIEV: Okay. I'm relying
7 on our policy and the statute. I've never heard such
8 a thing, your Honor, to be honest with you.

9 SPECIAL MASTER SCHNEIDER: Can you give
10 me the citation?

11 MS. HAAS GEORGIEV: Not off the top of
12 my head.

13 SPECIAL MASTER SCHNEIDER: It must have
14 been in your papers. I mean you say it, but if there
15 is support for your position, I'd love to see it. I
16 would love to see it.

17 MS. HAAS GEORGIEV: All right. After
18 this call, I will --

19 SPECIAL MASTER SCHNEIDER: No. We're
20 done. I'm ruling on the argument. We're not holding
21 this up.

22 MS. HAAS GEORGIEV: Okay.

23 Well, you've seen my brief, I guess
24 I'll stop on that.

25 But my final point is that J&J is

1 effectively requesting documents under CPRA by
2 requesting the reclassification from attorneys' eyes
3 only to publication.

4 SPECIAL MASTER SCHNEIDER: Okay.

5 Susan, you have the burden of proof, so
6 let's hear from Dan first.

7 Dan, any last word you want to add that
8 we haven't talked about?

9 MR. LAPINSKI: The last comments that
10 I'll make, your Honor, is simply that Ms. Sharko said
11 that plaintiffs' position was that the public was too
12 dumb to make a determination as to the credibility of
13 the publications of either Dr. Saed or Dr.
14 Smith-Bindman and, therefore, they shouldn't be
15 provided with the documents. And that's not our
16 position at all.

17 Our position, your Honor, is that if
18 there is going to be a decision that's going to be
19 made about the credibility of Dr. Saed and Dr.
20 Smith-Bindman, it should be done at trial and it
21 should be done on cross-examination when there is an
22 opportunity for the evidence to be put into the
23 appropriate context and done at the appropriate time.
24 Neither Dr. Saed nor Dr. Smith-Bindman should be
25 tried in the public eye by Johnson & Johnson or

1 anyone else before we reach trial.

2 And to the extent that these documents
3 are made public, one, the experts are harmed by the
4 publication for the reasons that I've cited
5 previously. But then two, plaintiffs and plaintiffs'
6 counsel are harmed because it provides the
7 opportunity to be able to taint the experts before
8 trial and before the experts get to be tested on the
9 stand.

10 SPECIAL MASTER SCHNEIDER: Susan, last
11 word?

12 MS. SHARKO: Thank you.

13 My clients have been harmed and
14 continue to be harmed by the trial of this case in
15 the public eye, number one.

16 Number two, the general public is
17 harmed by the trial of the case in the public eye
18 when all the information and the true facts are
19 hidden from view.

20 Number three, sunlight is the best
21 disinfectant. These are issues of significance and
22 public importance at this point in time and
23 everything should be out there in terms of the expert
24 materials. That's my argument.

25 And then finally, I just want to make

1 sure that UCSF, having come to New Jersey, having
2 interjected themselves into this dispute, having
3 taken part in oral argument, and having filed briefs
4 will be bound by your Honor's rulings.

5 That's my position.

6 SPECIAL MASTER SCHNEIDER: Don't you
7 already have the documents?

8 MS. SHARKO: I have the documents so
9 far, but there are more documents to be had.

10 Discovery was put on pause two years
11 ago and now we have the publication. And under the
12 proposed case management order that we submitted to
13 Judge Shipp, the plaintiffs have the ability to
14 supplement and amend all of their expert disclosures
15 on or before November 15 and then we have the
16 opportunity to take depositions as to new material.

17 Judge Shipp hasn't signed that order
18 yet, but those points I just raised were not in
19 dispute. Ms. Parfitt, Ms. O'Dell and I agreed to
20 those. There is only one paragraph that's in
21 dispute.

22 SPECIAL MASTER SCHNEIDER: The issue as
23 to the discoverability of future documents is
24 certainly not before me at the present time, so I am
25 not going to weigh in on that issue one way or the

1 other.

2 The only issue I want to weigh in on is
3 the issue before me, which is the application to
4 strike the confidentiality and I'll also say the
5 attorneys'-eyes-only designations as to these
6 doctors' documents.

7 What I'd like to do now, it's about
8 4:10 now, can we take a very short break, let me get
9 my notes together and we'll come back on the record.
10 I'll read my oral opinion into the record to be
11 confirmed by a court order.

12 Why don't we come back at 4:30, that's
13 20 minutes, and you'll get my ruling.

14 Okay?

15 MS. PARFITT: Very good.

16 MR. LAPINSKI: Thank you, your Honor.

17 MS. SHARKO: Thank you.

18 (Recess is taken.)

19 SPECIAL MASTER SCHNEIDER: What I'm
20 going to do is I'm going to read my ruling into the
21 record, I'm going to confirm it in an order, and like
22 I did the last time, I'm going to go off video
23 because I think it's a lot easier for me to read it
24 if I'm not on video and then I'll get back on.

25 This matter is before the Special

1 Master on J&J's application to strike the
2 confidentiality designations on documents from Dr.
3 Saed and Dr. Smith-Bindman.

4 Generally, the documents at issue are
5 anonymous peer-review documents and manuscripts that
6 doctors submitted for publication which have
7 eventually been published; some draft manuscripts,
8 communications regarding the manuscripts, and perhaps
9 some data generated in the course of the doctors'
10 studies.

11 The application is opposed by the
12 plaintiffs in the case as well as The Regents of the
13 University of California, which will hereinafter be
14 referred to as "The Regents."

15 It's important to note that the doctors
16 at issue, Dr. Saed and Dr. Smith-Bindman, are both
17 testimonial experts in this talc litigation. This is
18 not the first time the Special Master has addressed
19 these doctors' documents. On August 3rd, 2021 in
20 Special Master Order Number 10, the Special Master
21 addressed whether the documents from these doctors
22 are discoverable. Defendants' application for the
23 documents was granted and denied in part.

24 On October 8, 2021, the Special Master
25 held oral arguments on defendants' challenge to

1 plaintiffs' attorneys-eyes-only designations on the
2 doctors' documents.

3 The Special Master struck the
4 attorneys'-eyes-only designations, but ordered that
5 they be replaced with a confidentiality designation.
6 The rulings then applied to the documents of Dr.
7 Saed. Although the Special Master incorporated its
8 rulings into Special Master Order Number 13 dated
9 October 12, 2021, the order never made it to the
10 docket because of LTL's bankruptcy filing.

11 During the oral argument on October 8,
12 2021, the Special Master addressed whether, in the
13 first instance, plaintiffs met the standard in the
14 Third Circuit's Pansy decision. The Special Master
15 held that the doctors' documents met that standard
16 and it has no intention of revisiting that ruling.

17 In the first instance, the Special
18 Master held that the plaintiffs have met the good
19 cause standard to designate the documents as
20 confidential. The Special Master also ruled that the
21 documents at issue were relevant and not privileged
22 and that holding will not be disturbed.

23 As the parties know, while the Special
24 Master was on the bench, it issued a detailed opinion
25 addressing a similar although not identical issue to

1 what is presented here. See *In re Valsartan*, 512
2 F.Supp. 3d 546 (DNJ 2021). That opinion addressed
3 the standard to justify a confidentiality designation
4 under a discovery confidentiality order or sometimes
5 known as a protective order and whether that standard
6 was met. The Valsartan ruling and discussion is
7 incorporated herein by reference.

8 As the Special Master said on October
9 8, 2021, the ultimate question to be decided is not
10 whether there is good cause to designate the
11 documents at issue as confidential since that issue
12 has been decided. The real issue to decide is
13 whether the interests of the doctors and The Regents
14 outweighs the interests of defendants and the public
15 necessitating that plaintiffs' confidentiality
16 designations stay or be stricken.

17 After weighing all relevant factors,
18 the Special Master concludes, based on the new
19 evidence defendants submitted and the change in
20 circumstances from what existed on October 8, 2021,
21 that the paramount interests of the public and the
22 interests of the defendants outweigh those of the
23 doctors and The Regents. And accordingly, it will be
24 ordered that plaintiffs' confidentiality designations
25 on the documents at issue be stricken.

1 Plaintiffs argue nothing new has been
2 presented to justify a different ruling from October
3 8, 2021. The Special Master wholeheartedly disagrees
4 and believes the record presently before the Special
5 Master is materially different than what existed on
6 October 8, 2021. I will explain.

7 One, plaintiffs relied on Dr.
8 Smith-Bindman's article in an argument presented to
9 Judge Shipp in a public record. The documents at
10 issue address the article plaintiffs relied upon in a
11 public filing.

12 Two, contrary to what plaintiffs argue,
13 the fact that the articles were not published at the
14 time of the October, 2021 argument was, in fact, a
15 material factor in the Special Master's ruling as to
16 why a confidentiality designation was appropriate.
17 The possibility that the manuscripts may be published
18 is now a nullity since, in fact, the manuscripts have
19 been published.

20 Three, other experts have considered
21 and may be relying on the expert opinions of Dr. Saed
22 and Dr. Smith-Bindman in their research and opinions
23 that are addressed in the published articles.

24 Four, the public interest in this case
25 and the experts' opinions in the case are even more

1 magnified than it was in 2021 due to the massive
2 publicity generated by LTL's bankruptcy filing. The
3 public's interest in the experts' conclusions cannot
4 be underestimated.

5 It is clear to the Special Master,
6 therefore, based on the new circumstances presented,
7 that a new balancing of interests is necessary and
8 that the Special Master cannot rely on the balancing
9 done in October 2021 under different circumstances.

10 Importantly, the Special Master noted
11 in its October 8, 2021 oral opinion that its decision
12 was based on the present record then existing. I
13 specifically noted that I would entertain a new
14 application from J&J based on new facts. That is
15 what is being done now.

16 Amongst the most important reasons
17 justifying the present ruling is the fact that J&J is
18 materially prejudiced by plaintiffs' confidentiality
19 designations. The reason is because although Dr.
20 Saed and Dr. Smith-Bindman's opinions have been
21 published and Dr. Smith-Bindman's article has been
22 cited to Judge Shipp, the medical community and the
23 public at large, due to plaintiffs' confidentiality
24 designations, J&J is unable to fully and effectively
25 rebut their opinions because it cannot publicly cite

1 to the documents that have been designated
2 confidential.

3 The confidentiality designations
4 prevent J&J from educating the public that Dr. Saed's
5 opinions and work product and possibly Dr.
6 Smith-Bindman's have been discredited by others. It
7 is fundamentally unfair to J&J to permit the doctors
8 to publicly espouse their opinions but deny J&J the
9 opportunity to effectively defend itself.

10 The Special Master takes no sides in
11 who is right or who is wrong, however, when one side
12 is prevented from telling the full story, J&J should
13 have an adequate and equal opportunity to present the
14 other side. The fact that J&J has the data these
15 experts relied upon, in the Special Master's view, is
16 not enough. The comments of peer-reviewers will help
17 present a complete picture. The public can give the
18 comments whatever weight it wants.

19 The other main reason justifying the
20 Special Master's ruling is the paramount public
21 interest in this litigation and the experts'
22 opinions. The public deserves to hear the full story
23 and weigh for itself what to believe or not to
24 believe. At present, it only hears Dr. Saed's and
25 Dr. Smith-Bindman's full side of the story. In

1 fairness and to assure equal treatment and
2 opportunity, the public has a paramount interest in
3 hearing information that may or may not rebut the
4 doctors' opinions. The public needs to have an
5 opportunity to give whatever weight it wants to the
6 comments of anonymous peer-reviewers.

7 Also significant to the Special
8 Master's analysis is that plaintiffs rely on Dr.
9 Smith-Bindman's article in a public filing to Judge
10 Shipp. Unless the confidentiality of the documents
11 is stricken, J&J will be denied an opportunity to
12 publicly effectively rebut and discredit her opinions
13 that have been revealed to the public, and again, the
14 public will be prevented from getting the whole
15 story.

16 To be sure, the Special Master is not
17 holding that in every case peer-review comments and
18 draft manuscripts are discoverable and do not deserve
19 confidentiality protection. Here we have a situation
20 where we are dealing with articles that were already
21 published and both of the authors are testimonial
22 experts for a party in a case of paramount public
23 importance.

24 In addition, plaintiffs have already
25 relied on the experts' work product that has been

1 publicized to the court and public. In addition, the
2 public interest in the subject matter at issue is
3 intense and the subject matter involves an issue of
4 grave importance to the public health.

5 Last, for the reasons stated, a party
6 defendant will be materially prejudiced unless the
7 confidentiality designations on the experts'
8 documents are removed. Balanced against these
9 interests favoring public disclosure, respectfully,
10 plaintiffs present only vague and general notions of
11 harm that could occur if their confidentiality
12 designations are stricken.

13 The Special Master is not satisfied
14 plaintiffs have made the case that the experts' work
15 product and methodology is especially secret and
16 novel, nor does the Special Master believe the
17 peer-review process will be materially impacted by
18 disclosure given the special circumstances presented
19 here.

20 By no means does the Special Master
21 believe its ruling will open the flood gates to the
22 discovery of peer-review documents and public
23 disclosure of peer-review documents.

24 The crux of plaintiffs' arguments as to
25 the harm to be suffered by striking the

1 confidentiality designations is on page 4 of
2 plaintiffs' September 20, 2023 letter.

3 The Special Master finds plaintiffs
4 have not satisfied their burden of proof as to those
5 arguments with supporting evidence.

6 At bottom, the parties can quibble over
7 whether the interests of the doctors or J&J are more
8 important. However, what can't be legitimately
9 argued in this case is that the public interest is
10 paramount. The Special Master believes that was not
11 fully taken into account in plaintiffs' arguments.
12 Given the paramount public interest in this matter
13 and the public's unqualified right of access to
14 non-privileged relevant evidence bearing on an issue
15 of paramount public importance to the public health,
16 the Special Master finds that the confidentiality
17 designation should be stricken.

18 As noted, The Regents filed their
19 opposition to J&J's application. The Special Master
20 has considered The Regents' arguments and as will be
21 explained, rejects its position that J&J's
22 application should be denied.

23 First, there is a substantial question
24 whether The Regents have standing to object to J&J's
25 application. Further, it is not insignificant that

1 Dr. Smith-Bindman has not objected or weighed in on
2 J&J's application. Nevertheless, the Special Master
3 does not have to decide the standing issue to deny
4 The Regents' application. The Regents primarily rely
5 on the California Public Records Act to support its
6 argument that Dr. Smith-Bindman's documents should
7 remain confidential. However, that statute has no
8 applicability here because we are not addressing a
9 FOIA or Right-to-Know-type information request
10 directed to The Regents. Instead, we are addressing
11 an issue in connection with civil litigation.

12 Section 7920.200 of the Public Records
13 Act provides that the statute does not affect the
14 rights of litigants under the laws of discovery of
15 California. Further, a leading California evidence
16 treatise notes that the "Public Records Act does not
17 affect discovery rights" and that "information may be
18 subject to discovery even though it is exempted from
19 public disclosure." See Witkin California Evidence,
20 6th Edition, Witnesses Section 302 (2023).

21 In addition, in *Marylander v Superior*
22 *Court*, 81 Cal.App 4th, page 1119, pages 1124-25
23 (2000), the court held that as to civil discovery,
24 the rules of civil procedure and evidentiary rules
25 govern rather than California's Public Records Act.

1 The case cited by The Regents in its
2 opposition email, Humane Society of US v Superior
3 Court, has no applicability here since it did not
4 address civil discovery.

5 It is clear, therefore, that the
6 authority The Regents rely on is not applicable here
7 and does not bar J&J's application. The Regents'
8 reliance on the deliberative process privilege, the
9 official information privilege, and the researcher's
10 privilege is rejected without even addressing whether
11 these privileges exist. The Regents presented no
12 arguments or facts to satisfy its burden of proof
13 that these privileges exist and apply here.

14 Last, the Special Master notes that
15 even under the Public Records Act, if a specific
16 exemption does not apply, which appears to be the
17 case here, a balancing test of the parties' interests
18 is done to determine if disclosure is required. The
19 Special Master has already discussed why the
20 balancing of interests favors striking plaintiffs'
21 confidentiality designations.

22 Accordingly, in sum, for the reasons
23 stated, J&J's application to strike the
24 confidentiality designations and the
25 attorneys'-eyes-only designations on Dr. Saed and Dr.

1 Smith-Bindman's documents will be granted. Like it
2 did before, the order will provide that the status
3 quo will remain in effect for at least 14 days until
4 plaintiffs decide whether to appeal. If no appeal is
5 timely taken, this order may be implemented.

6 Counsel, that's the court's order.

7 For the good of the order, are there
8 any questions or any other issues that you want to
9 address?

10 I'm going to ask Theresa if she can get
11 the transcript to me in accordance with the local
12 rules. I doubt it will be necessary, but in case I
13 have to just clean up the oral opinion, I'll do that.
14 It will be published and you'll have a record of it.

15 The order should be entered probably
16 not today, but I would hope by Monday at the latest.

17 If there is nothing else, we can be
18 adjourned and I wish everyone a great weekend.

19 Thank you.

20 (Hearing Adjourned)

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C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public
and Certified Court Reporter of the State of New
Jersey, do hereby certify that the foregoing is a
true and accurate transcript of the testimony as
taken stenographically by and before me at the time,
place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a
relative nor employee nor attorney nor counsel of any
of the parties to this action, and that I am neither
a relative nor employee of such attorney or counsel,
and that I am not financially interested in the
action.

Theresa Kugler

Theresa Mastroianni Kugler,
Certified Court Reporter
Certificate No. XI0857
Notary Public, State of New Jersey
Commission Expires July 11, 2026
Commission No. 2410394
Date: September 25, 2023



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